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ALEXANDER L. STEVAS,
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No. _____

In the

Supreme Court of the United States

Term, 1983

DAVID P. LONGE,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

SANFORD ROSENBLUM
732 Madison Avenue
Albany, New York 12208
(518) 463-1107

Counsel for Petitioner

November, 1983

QUESTION PRESENTED

1. Does the disparity of sentencing of similarly situated persons under the New York Penal Law violate the rights of equal protection of the law as guaranteed by the United States Constitution?

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CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment XIV:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York Penal Law §70.00:

§70.00 Sentence of imprisonment for felony

> 1. Indeterminate sentence. Except as provided in subdivision four, a sentence of imprisonment for a felony shall be an indeterminate sentence. When such a sentence is imposed, the court shall impose a maximum term in accordance with the provisions of subdivision two of this section and the minimum period of imprisonment shall be as provided in subdivision three of this section.
>
> 2. Maximum term of sentence. The maximum term of an indeterminate sentence shall be at least three years and the term shall be fixed as follows:
>
> (a) For a class A felony, the term shall be life imprisonment;
>
> (b) For a class B felony, the term shall be fixed by the court, and shall not exceed twenty-five years;

(c) For a class C felony, the term shall be fixed by the court, and shall not exceed fifteen years;

(d) For a class D felony, the term shall be fixed by the court, and shall not exceed seven years; and

(e) For a class E felony, the term shall be fixed by the court, and shall not exceed four years.

3. Minimum period of imprisonment. The minimum period of imprisonment under an indeterminate sentence shall be at least one year and shall be fixed as follows:

(a) In the case of a class A felony, the minimum period shall be fixed by the court and specified in the sentence.

(i) For a class A-I felony, such minimum period shall not be less than fifteen years nor more than twenty-five years.

(ii) For a class A-II felony, such minimum period shall not be less than three years nor more than eight years four months.

In the

Supreme Court of the United States

Term, 1983

DAVID P. LONGE, *Petitioner,*

v.

THE PEOPLE OF THE STATE OF NEW YORK, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI

Petitioner David P. Longe respectfully prays that a writ of certiorari issue to review the judgment and opinion of the New York Court of Appeals refusing petitioner leave to appeal, entered in this proceeding on September 6, 1983.

OPINIONS BELOW

The Certificate Denying Leave of the New York Court of Appeals, entered September 6, 1983 is reprinted in Appendix A. No opinion was rendered.

The Decision of the New York Supreme Court Appellate Division, Third Judicial Department dated July 14, 1983, is reprinted in Appendix B. No opinion was rendered.

The judgment of the New York County Court of Albany County (Clyne, J.) rendered August 19, 1981, is reprinted in Appendix C.

JURISDICTION

The Order of the New York Court of Appeals, denying leave to appeal the decision of the Appellate Division Third Department which affirmed the County Court judgment, was entered on September 6, 1983. This petition is filed within 60 days of said Order in compliance with Rule 20.1. The Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

STATEMENT OF FACTS

David P. Longe was convicted on July 31, 1981 by plea of guilty of two Class-II felonies — Criminal Possession of a Controlled Substance in the Second Degree (P.L. §220.18) and Criminal Sale of a Controlled Substance in the Second Degree (P.L. §220.41), in full satisfaction of two outstanding indictments (R:4-33).*

In the period between plea and sentencing, the Court was furnished with a pre-sentence memorandum prepared by appellant's counsel which contained numerous letters submitted on appellant's behalf (R:34-65), and a pre-sentence report prepared by the Albany County Probation Department (submitted under separate cover as PSR:1-7).

On August 19, 1981, appellant was sentenced to concurrent indeterminate sentences of imprisonment of 8 1/3 years to life (R:66-76). This sentence, the maximum which he could have received, was imposed despite the fact that appellant, the product of a broken home, had overcome family difficulties to complete his education (R:36-38; PSR: 4-7); his fiance was expecting their first child (PSR:5); and the Albany County Probation Department had recommended a minimum period of incarceration (PSR:7).

The petitioner appealed the County Court judgment to the New York Supreme Court Appellate Division Third Department. The issues raised in that appeal were whether the sentence of incarceration imposed on the petitioner was unduly harsh and excessive as a matter of law, and, whether the disparity of sentencing among similarly situated persons violates petitioner's rights to equal protection of the law as guaranteed by the Constitutions of New

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*R, PSR and A refer to pages of the record filed in the Appellate Division Third Department

York and the United States. The Appellate Division affirmed the judgment of the County Court without rendering an opinion. (Appendix B).

The Petitioner thereafter sought leave to appeal from the New York Court of Appeals upon the same issues presented to the Appellate Division. Permission was denied by Order of Hon. Hugh R. Jones, Associate Judge, dated September 6, 1983 on the ground that no questions of law were presented which ought to be reviewed by the Court of Appeals. (Appendix A).

REASON FOR GRANTING THE WRIT

I

The disparity of sentencing among similarly situated persons violates the individual's rights to equal protection of the law as guaranteed by the Constitution of the United States

A Joint Committee evaluating New York drug laws found that over 95% of Class A-II offenders received the minimum possible term.[1] This was in spite of the fact that approximately two-thirds of Class A drug felons had previous drug arrests as well as other felony arrests.[2]

In the present case, petitioner was given the maximum term of imprisonment, a harsher sentence than those meted out to 95% of persons convicted of the same offense-persons with much less favorable records than appellant.

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[1] The Nation's Toughest Drug Law: Evaluating the New York Experience – Final Report of the Joint Committee on New York Drug Law Evaluation (Association of the Bar of the City of New York; Drug Abuse Council, 1978) at 101 (hereafter Joint Committee Report); see also, Sentencing Patterns Under the 1973 New York State Drug Laws: a staff working papers of the Drug Evaluation Project, prepared by Philip Richardson and Martin Heilweil and published as chapter four of Staff Working Papers of the Drug Law Evaluation Project: A Companion Volume to the Final Report of the Joint Committee on New York Drug Law Evaluation. (Washington: National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, United States Department of Justice, 1978) at pp. 296-30 (hereinafter Staff Working Papers); Richardson and Grooper, Evaluating Drug Laws and Control Policy Effectiveness: New York's experience with the nation's toughest drug law, in Discretion and Control

The United States Constitution prohibits the denial of equal protection of law.

In the administration of criminal justice, it has been determined that equal protection requires that "no different or higher punishment should be imposed upon one than such is prescribed to all for like offenses." *Barbier v. Connolly*, 113 U.S. 27 31 (1885); *People v. Jones*, 39 N.Y. 2d 694 (1976).

The sentence imposed upon petitioner presents an even more egregious situation than that of two like individuals who receive different terms of imprisonment. Petitioner, without a previous felony arrest and with numerous mitigating factors, received a harsher sentence than the majority of repeat felony drug offenders.

The present case highlights the widespread "disparity, inconsistence and uncertainty" which marks sentencing in New York — a problem that has been criticized as "greatly diminishing its ability to do justice or to control crime."[4]

The disparity is not confined to drug offenses. The Governor's Executive Advisory Committee on Sentencing presented eight identical pre-sentence reports to 41 judges throughout New York and asked them to recommend an appropriate sentence (A: 75-8). The widespread inconsistence of the sentences recommended for each of the eight situations defies a consistent, rational interpretation. Sentences recommended for the violent felony offense of First Degree Robbery ranged from 0-3 years to 8 1/3-25 years (A:76-77). The same range of sentences were recommended for a conviction of First Degree Manslaughter (A:80). It is sad commentary indeed to note that this appellant has received a harsher sentence for a first-time drug offense not involving very large quantities than the harshest sentence that would have been imposed for the violent

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(Beverly Hills: Sage Publications, 1978); Crime and Punishment in New York: an inquiry into sentencing and the criminal justice system, prepared by Executive Advisory Committee on Sentencing, Albany, 1979) (hereinafter Crime and Punishment)

[2] Staff Working Papers, supra., at 291-94

[3] U.S. Const. amend XIV §1

[4] Crime and Punishment, supra.

felonies of robbery and manslaughter by 41 other New York State Judges.

At the present time, we have in New York a situation where the fundamental right of "liberty", which is deprived by any period of incarceration, is being deprived in a disparate and irrational manner which bears no legitimate relationship to the valid state interests to be protected and which interests can, in any event, still be protected by less onerous alternatives. This situation violates the constitutional guarantee of equal protection thereby requiring that this sentencing scheme be strictly scrutinized and the burden placed on the State to come forward with a compelling state interest that justifies this disparate treatment. See, *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Alevy v. Downstate Medical Center*, 39 N.Y. 2d 326 (1976).

A defendant who pleads guilty waives many valuable Constitutional rights. As noted above, this affords benefits to both the prosecution and defendant and a plea is often made by defendants without concern for guilt or innocence. See also, *People v. McConnell*, 49 N.Y. 2d 340 (1980); *People v. Perry*, 36 N.Y. 2d 114 (1975). This Court is well aware that a breakdown of the plea bargaining system would overwhelm the criminal justice system. The unconstitutional disparity in sentencing is a significant contributing factor in the disintegration of this process.

The Executive Advisory Committee on Sentencing has delineated the adverse affects the arbitrary disparity of sentencing has on the criminal justice system. The study found that:

1. Irreparable injury is done to the quality of justice;
2. Potential offenders are encouraged to play the odds, believing they too may escape serious sanction;
3. It causes prison unrest and discontent; and
4. The entire criminal justice system is brought into public disfavor by weakening the credibility of the courts and respect for the rule of law itself.[5]

This disparate sentencing scheme, therefore, not only serves no compelling state interest but is actually a major factor contributing to the potential breakdown of our criminal justice system.

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[5] Crime and Punishment, supra, at 39.

CONCLUSION

For all these reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

SANFORD ROSENBLUM
732 Madison Avenue
Albany, New York 12208
(518) 463-1107

Counsel for Petitioner

APPENDIX

State of New York
Court of Appeals

BEFORE: HON. HUGH R. JONES, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

DAVID P. LONGE,

Appellant.

CERTIFICATE DENYING LEAVE

I, HUGH R. JONES, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Utica, New York
September 6, 19 83

Associate Judge

*Description of Order: Order of the Appellate Division, Third Department entered July 26, 1983, affirming judgment of Albany County Court entered August 19, 1981 (conviction - criminal possession of a controlled substance, second degree).

APPENDIX A

Supreme Court—Appellate Division
Third Judicial Department

July 14, 1983 45035

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,
v.
DAVID P. LONGE, Appellant.

Appeal from a judgment of the County Court of Albany County (Clyne, J.), rendered August 19, 1981, convicting defendant upon his plea of guilty of two counts of the crime of criminal possession of a controlled substance in the second degree.

Judgment affirmed. No opinion.

MAIN, J. P., CASEY, MIKOLL, YESAWICH, JR., and WEISS, JJ., concur.

APPENDIX B

DECISION

STATE OF NEW YORK

Supreme Court

Appellate Division

Third Judicial Department

JUSTICE BUILDING

ALBANY

HON. A. FRANKLIN MAHONEY

Presiding Justice

HON. MICHAEL E. SWEENEY
HON. T. PAUL KANE
HON. ROBERT G. MAIN
HON. JOHN T. CASEY
HON. ANN T. MIKOLL
HON. PAUL J. YESAWICH, JR.
HON. LEONARD A. WEISS
HON. HOWARD A. LEVINE

Associate Justices

JOHN J. O'BRIEN

CLERK

STATE OF NEW YORK
COUNTY COURT **COUNTY OF ALBANY**

THE PEOPLE OF THE STATE OF NEW YORK,

D.A. NO. 810753

-against-

DAVID P. LONGE,

Defendant.

SENTENCING

BEFORE:

HON. JOHN J. CLYNE,
Albany County Court Judge

APPEARANCES:

For the People:
HON. SOL GREENBERG
Albany County District Attorney
BY: LAWRENCE P. WIEST,
Assistant District Attorney

For the Defendant:
SANFORD ROSENBLUM, ESQ.,
Attorney at Law,
732 Madison Avenue,
Albany, New York

DEFENDANT, In Person

TRANSCRIPT OF PROCEEDINGS in the above entitled matter held at a trial term of the Albany County Court at the Albany County Courthouse at Albany, New York, on August 19, 1981.

APPENDIX C

THE COURT: David Longe?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Represented by your attorney, Mr. Rosenblum?

THE DEFENDANT: Yes, sir.

THE COURT: The People are represented by Mr. Wiest.

The matter is before the Court this date for sentencing, the defendant having previously been convicted of the crimes of criminal possession of a controlled substance in the second degree, a Class A-II felony, and criminal sale of a controlled substance in the second degree, a Class A-II felony.

Mr. Wiest, do the People wish to be heard in reference to sentencing?

MR. WIEST: No, Your Honor.

THE COURT: Mr. Rosenblum, do you wish to be heard in reference to sentencing?

MR. ROSENBLUM: Very briefly, Your Honor.

Your Honor, I am aware now that the probation department has filed a pre-sentence investigation report with the Court, and having been given the opportunity to examine it this morning by the Court, it is my understanding, Your Honor, from reading the last page of the report that although no specific sentencing recommendation was made that in the paragraph above that recommendation, Your Honor, the probation department does suggest that a minimum period of incarceration would, in their opinion, serve to the ends of justice, Your Honor.

I have also, as Your Honor knows, filed a pre-sentence memorandum with the Court and I appreciate the time the Court has taken in my presence, in fact, to read carefully through that report and give it serious consideration.

Your Honor, I would only like to add one thing to the pre-sentence investigation and to the pre-sentence memorandum that I have filed with the Court. Up until about a year ago this man

had, by all accounts, public record and private record, Your Honor, led an unexceptional life. He finished high school by getting his H.S.E. and he went on to college and after he did one year of college he became employed on a full-time basis and was always employed, Your Honor, on a full-time basis until about a year ago when he went off the path, Your Honor.

Those bad deeds that he has committed are now a matter of record in this court. He has admitted his guilt, Your Honor, and in answering the questions of this Court — and this Court did take the time to question the defendant in detail — he made an open admission of those acts and there is no doubt in my mind, Your Honor, that he is sincerely contrite for the acts that he has engaged in during the last year.

I would like, Your Honor, to spread on the record — it would take me about one or two minutes — to read into the record something which I think, Your Honor, epitomizes the twenty-four years of his life that he led before that, and I would like to read it as an extract, Your Honor, a brief extract from a letter which was received by me directed to the Court which I have filed with the Court, but I would nevertheless like to spread that one brief remark on the record.

His aunt, Janice Boehm Tupper, who is in court today with David's mother, claims that David, contrary to by nature of being an anti social individual, is a very compassionate and warm and supportive human being, Your Honor.

In the second letter which is in the pre-sentence memorandum — there is an index, Your Honor —

THE COURT: I see it.

MR. ROSENBLUM: All right. She says that he was either four or five years old when his grandfather developed glaucoma. Drops were needed in his eyes four times a day. This was David's job. At the age of eleven his grandfather had developed Parkinson's and also a cerebral hemorrhage and became a vegetable. This little lad helped with the care of him, putting bedpans under him, helping move him from a wheelchair into his bed, feeding him or whatever was needed to make him comfortable. When these things had to be done, David would be out playing with friends but

would leave his friends to come home to check on his grandfather. David was twenty-one when his grandmother was diagnosed as terminal cancer. She was living with me and before or after David went to work he would stop to visit with her, and on nice spring days he would pick her up in his arms, carry her outside, put her in a wheelchair and wheel her around so she could see flowers blooming and smell the wonderful smells of springtime before she passed away.

Your Honor, I think that truly epitomizes this individual before he strayed from the path. He is a young man who is twenty-five years old and I truthfully believe, Your Honor, that if given the opportunity after a brief prison sentence, he would come out and be a useful member of society.

I think that the longer he is in, Your Honor, the less chance he will come out as a basically whole human being that he is.

Thank you, Your Honor, for the opportunity.

THE COURT: Mr Longe, do you wish to be heard in reference to sentencing?

THE DEFENDANT: No, sir.

THE COURT: The Court has read the pre-sentence report in this case. In addition to which the Court heard the plea recitation. The plea recitation sustains the charges set forth in the indictment, an A-I felony.

The defendant has been given the benefit of the doubt and permitted to plead to the reduced charge of the A-II felony. The plea recitation and the statements of the defendant to the probation officer clearly establishes that this defendant was a drug dealer for profit. In the judgment of this Court, when an individual chooses that path and is caught, then it becomes a business risk and the ledger must be balanced at the time of sentencing.

It is the judgment of this Court the drug business causes incalculable harm to so many people and difficult as it may be for the law enforcement authorities to apprehend drug dealers, once they are apprehended then I feel it is incumbent upon the Courts to impose appropriate sentences. The sentence to be imposed in this case will reflect those comments.

Mr. Rosenblum, do you wish to comment upon the comments of the Court?

MR. ROSENBLUM: Only to the degree, Your Honor, that I believe that the ledger will be fully balanced in David's case, looking at him as an individual, by sentencing him to the most minimum sentence, Your Honor, that the Court can and is permitted by law — remembering that in any event he is in debt to society by law until the day he dies.

THE COURT: Mr. Longe, do you wish to comment upon the comments of the Court?

THE DEFENDANT: Yes, sir. I have talked to Mr. Rosenblum. I was willing to cooperate with whatever cooperation was required. I know I have done a wrong deed and I feel that severe punishment on this matter doesn't do any good. It could lead, like Mr. Rosenblum said, to something further and I feel that the minimum sentence required is enough to make me learn to mend my ways.

THE COURT: David Longe, do you have any legal cause to show why sentence should not now be pronounced?

THE DEFENDANT: No, sir.

THE COURT: David Longe, having previously been convicted of the crime of criminal possession of a controlled substance in the second degree, a Class A-II felony, it is the judgment of this Court that you be sentenced to an indeterminate sentence of imprisonment which shall have a maximum term of life imprisonment and the Court hereby imposes a minimum period of imprisonment of eight and one-third years and that you be committed to the New York State Department of Correctional Services and that you be delivered to the Clinton Correctional Facility at Dannemora, New York, there to be dealt with in accordance with the laws pertaining to your sentence.

On the conviction for the criminal sale of a controlled substance in the second degree, a Class A-II felony, it is the judgment of this Court that you be sentenced to an indeterminate sentence of imprisonment which shall have a maximum term of life imprisonment and the Court hereby imposes a minimum period of imprisonment of eight and one-third years, and that you be committed to the New

York State Department of Correctional Services and that you be delivered to the Clinton Correctional Facility at Dannemora, New York, there to be dealt with in accordance with the laws pertaining to your sentence.

This sentence shall run concurrently with the sentence previously imposed.

MR ROSENBLUM: Your Honor, my understanding is that one of the indictments contained a C felony.

THE COURT: It was in satisfaction of the plea.

MR. ROSENBLUM: Thank you.

THE COURT: Defendant is remanded to the custody of the sheriff.

(Thereupon proceedings in the above entitled matter were concluded.)

STATE OF NEW YORK
ALBANY COUNTY COURT

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

CERTIFICATE

DAVID P. LONGE,

Defendant.

I, CAROLE M. RYAN, C.S.R., and Official County Court Reporter, do hereby certify that the foregoing is a true and accurate transcript of the proceedings reported stenographically by me in the above matter held before Hon. John J. Clyne, Albany County Court Judge, at Albany, New York, on August 19, 1981.

signature

